

1 THE HONORABLE RONALD B. LEIGHTON
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9
10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON
12 AT TACOMA

13 JEFF BUTLER and BRYCE MEYER,
14 individually and as the representatives of all
15 persons similarly situated,

16 Plaintiff,

17 v.

18 AMERICAN FAMILY MUTUAL
19 INSURANCE COMPANY and AMERICAN
20 STANDARD INSURANCE COMPANY OF
21 WISCONSIN, foreign insurers,

22 Defendants.

23 No. 3:14-cv-05305 RBL

24 DEFENDANTS' MEMORANDUM IN
25 OPPOSITION TO PLAINTIFF'S MOTION
26 FOR CLASS CERTIFICATION

Noting Date: May 29, 2015

Oral Argument Requested

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I. INTRODUCTION

Plaintiff Meyer seeks to certify a class of Defendants' insureds to recover "diminished value"¹ to accident vehicles meeting prescribed criteria, and to recover damages related to Defendants' claim handling conduct. Plaintiff's motion rests mostly on *Moeller v. Farmers Ins. Co. of Washington*,² and other decisions generally arising in the context of denials by various other insurers based upon their respective Collision coverages. Those decisions offer little help to Plaintiff where, if certain conditions are met, American Family Mutual Insurance Company ("AFM") acknowledges that its underinsured motorist coverage for property damage ("UIM PD") provides for payment of loss in value to a vehicle.

In UIM coverage, the insurer stands in the shoes of the uninsured/underinsured driver. So, there are two aspects to Plaintiff's proposed class: 1) how AFM responds to claims for inherent physical damage,³ and 2) claim handling issues.⁴ Plaintiff's motion focuses on the physical damage which is but part of the contractual damage issue. His motion ignores the claims handling aspect. Both issues are overwhelmed by individualized inquiries and are unsuited for a class action, as discussed in detail below.

¹ Defendants challenge the validity of Plaintiff's expert's regression analysis, and they will file a separate motion asking this Court for an evidentiary hearing and to strike Dr. Siskin's opinions. The scope and estimate of the time required for such a hearing will depend, in part, upon Plaintiff's response(s) to the Defendants' experts. *See Declaration of John A. Bennett in Opposition to Plaintiff's Motion to Certify ("Bennett Dec"), February 27, 2014, Exhibits 31-33.* Plaintiff contends that the proposed class seeks only loss in market value attributable to "inherent" physical damage that remains following repair, not loss in market value attributable to the stigma an accident vehicle may suffer following the accident. Bennett Dec, Exhibit 6 at 2, ¶4. For convenience, Defendants will refer to loss of market value, whether caused by inherent physical damage or stigma, as "DV."

² *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wash.2d 264, 271, 267 P.3d 998 (2011).

³ To trigger any entitlement to coverage, physical damage to the vehicle must occur. RCW 48.22.030(3); *Degenhart v. AIU Holdings, Inc.*, 2010 WL 4852200, 5 (W.D.Wash., Nov. 26, 2010) (not reported).

⁴ Defendants will separately contest the merits of Plaintiff's claim handling cause of action. It is discussed here in light of the admitted fact that Meyer was aware of DV, and that he did not disclose his intent to make a DV claim until he joined this lawsuit.

II. BACKGROUND

When this lawsuit was first filed, the sole named plaintiff was Jeff Butler (“Plaintiff Butler”). He sought to recover damages as an assignee of Christina Bower, and to represent a class of insureds, as Mr. Meyer now seeks to do. Plaintiff Butler withdrew as a named plaintiff and dismissed his claims. However, he claims to remain as an absent member of the proposed class.⁵ As the ascertainability of any proposed class is an issue, the circumstances of Butler’s claim will be addressed briefly below.

The contractual duty to pay for DV does not specifically appear in the language of the insurance contract. Plaintiff Meyer alleges “these insurance policies . . . obligated American Family to pay compensatory damage an Insured person is legally entitled to recover[] from the owner or operator of an underinsured motor vehicle”⁶ The purported class members allegedly “suffered damages as a result of American Family’s⁷ breach of its insuring agreement with its insureds and its violation of the Washington Administrative Code and, as a result its violation of the Washington Consumer Protection Act.”⁸

Plaintiff sets aside a discussion of how AFM actually adjusts DV claims under the UIM PD coverage to portray liability for breach of contract as simply a battle of competing estimating formulas for physical damage. Plaintiff Meyer tells this Court that “AmFam has a

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⁵ See Plaintiff Butler’s Motion for Voluntary Dismissal Pursuant to FRCP 41(a)(2) and to Withdraw as Class Representative (“Butler Mot Dismiss”), November 3, 2014 at 1-2. Plaintiff Butler asked that the dismissal of his claims be without prejudice “so that he may recover the diminished value to which he is entitled . . . in this class action, as an absent class member.” *Id.* at 3:13-16.

⁶ Bennett Dec, Exhibit 2 at 2 ¶¶ 1.1, 1.2.

⁷ The pleadings and motions filed on behalf of Plaintiff Butler (and, now, Plaintiff Meyer) refer to the two defendants jointly as “American Family,” or as “AmFam.” See, e.g., Plaintiff’s Motion for Class Certification (“Pl’s Mot”), December 15, 2014 at 1, 2.

⁸ Bennett Dec, Exhibit 2 at 2, ¶ 1.1.

1 well established and computerized process to determine the amount of the loss”⁹ that he
 2 identifies as “Autosource.”¹⁰ Plaintiff Meyer claims,

3 liability will be established through common evidence of
 4 AmFam uniform policy forms and uniform state wide
 5 diminished value avoidance policies. Damages can be
 6 calculated through the use of regression analyses *without the*
 7 *need for individualized inquiries* to determine Class Members’
 8 entitlement to relief or the amount of relief.¹¹

9 Sometime in 2010, AFM did begin using a vendor’s software program as one measure
 10 of DV.¹² However, DV claims have never been bound by the outcome of a software
 11 program. AFM has no special rules or guidelines for adjusting DV claims in the State of
 12 Washington.¹³ Nor were the adjusters required to rely upon a particular method, source, or
 13 type of information or a specified set of guidelines. AFM adjusters have used an
 14 individualized approach that has varied over the proposed class period. The property damage
 15 adjusters exercise a considerable amount of discretion in making judgment calls when
 16 adjusting individual diminished value claims under the UIM PD coverage.¹⁴

17 DV adjustment decisions are not the result of the application of a common policy or
 18 method. Plaintiff Meyer’s proposed class lacks commonality. Plaintiff Meyer does not have

19⁹ Pl’s Mot at 2:20-21.

20¹⁰ Autosource is a diminished value estimating program provided by Audatex, a third party
 21 vendor that provides a general auto damage estimating program; Pl’s Mot at 6:8-17.

22¹¹ Pl’s Mot at 21. Emphasis supplied. “In *Wal-Mart*, the Supreme Court disapproved what
 23 it called ‘Trial by Formula,’ wherein damages are determined for a sample set of class
 24 members and then applied by extrapolation to the rest of the class ‘without further
 25 individualized proceedings.’” *Wang v. Chinese Daily News, Inc.*, 709 F.3d 829 (9th Cir.
 2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541, 2561, 180
 L.Ed 2d 374 (2011) and superseded by 738 F.3d 538 (9th Cir. 2013)).

26¹² Bennett Dec, Exhibit 3 at 2; 19-20; 24:1-11.

¹³ Bennett Dec, Exhibit 4 at 2. Indeed, Plaintiff Meyer tries to make *the lack of evidence of a*
common practice into “uniform” wrongful conduct. *See* Bennett Dec, Exhibit 2 at 5; 6.

¹⁴ Bennett Dec, Exhibit 3 at 13:9-23; 15:16-17:14; 24:20-26:4.

1 claims typical of the proposed class. He has framed and limited the claims in an effort to
 2 prompt certification, however, the evidence from his own experts shows that doing so is
 3 contrary to the interests of the other members of the proposed class. Plaintiff Meyer has
 4 made strategic decisions to pursue his own recovery. He is not an adequate representative.

5 Individualized adjusting issues predominate, including the application of policy
 6 provisions that do not apply to all members of the class. A class is not a superior means of
 7 addressing DV disputes where the defendants do pay such claims, when supported by
 8 evidence and as affected by other UIM provisions in the insurance policies. Plaintiff
 9 Meyer's motion asking that this litigation proceed as a class action should be denied.

10 **III. STATEMENT OF FACTS**

11 **A. Plaintiff Meyer**

12 AFM issued an auto insurance policy to Plaintiff Bryce Meyer.¹⁵ Plaintiff Meyer
 13 borrowed to purchase a 2011 Ford GT Mustang (the "Mustang").¹⁶ He customized the
 14 Mustang,¹⁷ and unsuccessfully tried to sell it. He removed some, but not all, of the custom
 15 parts.¹⁸ On April 14, 2014, the car was damaged while parked at Meyer's workplace. There
 16 were no witnesses. He gave AFM notice of the loss. The incident was classified as a "hit
 17 and run."¹⁹

18

19¹⁵ See Bennett Dec, Exhibit 5 at 2. Plaintiffs responded "none" when asked to produce a
 20 copy of "any policies that provide UIM PD coverage *issued by American Standard*" to either
 Plaintiff Meyer or Christina Bower. Bennett Dec, Exhibit 6 at 7:17-20.

21¹⁶ Bennett Dec, Exhibit 7 at 14. The lienholder is the Alaska Federal Credit Union of
 Anchorage, Alaska. Bennett Dec, Exhibit 5 at 3; Exhibit 7 at 21.

23¹⁷ Bennett Dec, Exhibit 7 at 15:21-18:25.

24¹⁸ Mr. Meyer testified that he "returned it all to stock" before the vehicle was damaged, but
 25 some custom parts and new tires remained on the vehicle. Bennett Dec, Exhibit 7 at 19:13-
 20:12; 22:18-22.

26¹⁹ Bennett Dec, Exhibit 7 at 7; 8.

1 A family friend called Meyer and told him to make a claim for DV.²⁰ Meyer had the
 2 car repaired at Barrett's Collision Center ("Barrett's").²¹ He was dissatisfied with the repair.
 3 Prompted by dissatisfaction "with the Barrett's repair and . . . this issue [he had] about
 4 diminished value," Mr. Meyer contacted an attorney, Stephen Hansen, and a public adjuster,
 5 Darrell "Mike" Harber.²²

6 On July 5, 2014, Mr. Meyer's Mustang was damaged in a second incident.²³ The
 7 collision damaged some of the same areas and parts of the Mustang that were previously
 8 damaged. On July 28, 2014, AFM learned that a new plaintiff would be added, "[b]ryce
 9 meyer."²⁴ AFM made arrangements to inspect the Mustang.²⁵ AFM determined there had
 10 been some diminished value resulting from the April 14, 2014 accident,²⁶ and tendered a
 11 \$1,289.99 check as payment for diminished value.²⁷ Mr. Meyer was asked to supply
 12 information about the amount of DV loss he claimed. He failed to cooperate.²⁸

13 ///

14
 15²⁰ Bennett Dec, Exhibit 7 at 2.

16²¹ Barrett's is an auto repair shop in American Family Mutual's CRP program. Mr. Meyer
 17 knew that he could take his vehicle to the repair shop of his choice, and that Barrett's work
 was guaranteed. Bennett Dec, Exhibit 7 at 5; 12:25-13:11.

18²² Bennett Dec, Exhibit 7 at 4; 6; 9:17-10:4; 11; 26:25-27:3; 29.

19²³ Bennett Dec, Exhibit 7 at 24.

20²⁴ Bennett Dec, Exhibit 8 at 1; 2; 9; 10; Exhibit 7 at 3.

21²⁵ Bennett Dec, Exhibit 10 at 2; 3:13-17; 4:13-5:2; 17:3-18:15.

22²⁶ Bennett Dec, Exhibit 10 at 19:21-20:15.

23²⁷ Bennett Dec, Exhibit 7 at 28; Exhibit 11 at 1, 2.

24²⁸ Upon giving notice of a claim, an insured has a duty to cooperate, including supplying
 25 records concerning the vehicle. Bennett Dec, Exhibit 5 at 4. Plaintiff Meyer alleges that
 26 "[a]ll members of the proposed class have fully complied with all pertinent policy provisions
 to receive payment under their policies . . ." Bennett Dec, Exhibit 2 at 7, ¶ 5.2; Exhibit 12 at
 1, 2.

1 Meyer and AFM disagreed on issues related to Barrett's repairs. AFM prepared
 2 revised estimates, and paid an additional \$1,397.95.²⁹ Mr. Meyer decided not to seek
 3 damages in this lawsuit for the allegedly repairable, but unrepairs (or improperly repaired)
 4 damage. At Meyer's request that aspect of his claim was addressed by arbitration, as
 5 discussed further below.³⁰

6 AFM made a DV payment to Meyer. Meyer has never provided information to AFM
 7 to contest the amount paid, other than in the form of his motion for class certification through
 8 the Siskin declaration, and in the deposition of one of Plaintiff Meyer's DV experts, Darrell
 9 Harber. The Siskin formula and Mr. Harber's DV assessments are wildly different. The
 10 only thing they have in common is that they exceed AFM's assessment of the DV loss.

11 **B. Christina Bower/Plaintiff Butler**

12 Ms. Bower reported to AFM that the left rear corner of her 2011 Mini Cooper was
 13 damaged in a July 4, 2011 accident, a "hit and run."³¹ AFM did an initial inspection, and
 14 Ms. Bower selected Haury's Collision Repair ("Haury's") to do the repair work. AFM paid
 15 the full amount of the invoice. Plaintiff Butler is a part owner of Haury's, and he also owns
 16 Collision Consulting of Washington.³² Ms. Bower made a DV claim relying on a Collision
 17 Consulting report. After receiving assurances from Haury's that "the vehicle would be
 18 returned to pre-loss condition,"³³ the adjuster, Lisa McNally, considered the repair estimate,
 19 round-tabled the claim with her supervisor, and determined there was no evidence that the
 20 Mini Cooper had sustained a DV loss. Ms. Bower did not respond to requests for

21
 22²⁹ Bennett Dec, Exhibit 13 at 1.

23³⁰ Bennett Dec, Exhibit 14 at 1.

24³¹ Bennett Dec, Exhibit 15 at 1, ¶ 2.

25³² Bennett Dec, Exhibit 6 at 5:2-9.

26³³ Bennett Dec, Exhibit 4 at 22:18-19, 22-23; 23:3-7.

1 information that might support reconsideration. During the proposed class period, Bower
 2 submitted three separate claims for repairs to her 2011 Mini Cooper from three separate
 3 accidents to three insurers. Ms. Bower subsequently made an assignment to Mr. Butler.³⁴

4 **IV. MEYER LACKS STANDING TO BRING CLAIMS
 AGAINST AMERICAN STANDARD**

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 6 Plaintiff Meyer alleges the two defendants are “juridically linked, so that Plaintiffs
 7 can represent insureds of both American Family [insurance companies] as it relates to their
 8 diminished value losses.”³⁵ Plaintiff offers no evidence or argument to support these
 9 assertions. “[C]onstitutional standing requirements [must be] satisfied before proceeding to
 10 the merits.”³⁶ To establish Article III standing, a plaintiff must show that he or she (1)
 11 suffered an injury in fact that is (2) fairly traceable to the alleged conduct of the defendant,
 12 and that is (3) likely to be redressed by a favorable decision.³⁷ Plaintiff Meyer did not have
 13 an auto insurance contract with American Standard.³⁸ Plaintiff Meyer has no standing to
 14 bring these claims against American Standard in his own name, or on behalf of others.³⁹

15
 16 ³⁴ The alleged assignment makes no reference to a specific date of loss, a claim number, or
 even the name of any insurance company. Bennett Dec, Exhibit 17.

17 ³⁵ Bennett Dec, Exhibit 2 at 4, ¶¶ 2.6, 2.7.

18 ³⁶ *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007); *Warth v. Seldin*, 422
 19 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

20 ³⁷ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 119 L.Ed.2d 351
 (1992).

21 ³⁸ Bennett Dec, Exhibit 6 at 7:17-20. Plaintiff Butler is simply identified as “the beneficiary
 22 of an assignment given to him by his customer, Christina Bower, who was insured by
 [AFM].” Bennett Dec, Exhibit 1 at 4:21-26; Exhibit 2 at 3:13-19.

23 ³⁹ *Lee v. Am. Nat. Ins. Co.*, 260 F.3d 997, 1001-02 (9th Cir. 2001); *Schweickert v. Hunts Point*
 24 *Ventures, Inc.*, 2014 WL 6886630, 4 (W.D. Wash., Dec. 4, 2014) (granting judgment on the
 pleadings and dismissing plaintiff’s breach of contract claim as a matter of law where no
 contract was alleged between the plaintiff and the movants). A plaintiff who has no cause of
 action against a defendant “can not [sic] ‘fairly and adequately protect the interests’ of those
 who do have such causes of action.” *Perez v. State Farm Mut. Auto. Ins. Co.*, 2011 WL
 26 5833636 at 3, 4 (N.D. Cal., Nov. 15, 2011); *Shin v. Esurance Ins. Co.*, 2009 WL 688586,

1 **V. PLAINTIFF MEYER FAILS TO CARRY HIS BURDEN AS THE**
 2 **PARTY MOVING TO CERTIFY A CLASS.**

3 If the class is ascertainable and all four prerequisites of Rule 23(a) are satisfied, the
 4 court must also find that plaintiffs have “satisf[ied] through evidentiary proof” at least one of
 5 the three subsections of Rule 23(b).⁴⁰ Plaintiff Meyer’s motion invokes Rule 23(b)(3).⁴¹
 6 Rule 23(b)(3) requires a showing that questions of law or fact common to class members
 7 predominate over any questions affecting only individual members, and that a class action is
 8 superior to other available methods for fairly and efficiently adjudicating the controversy.

9 **A. Defendants do not dispute that Rule 23(a)’s numerosity requirement would**
 10 **likely be satisfied.**

11 The numerosity requirement would likely be satisfied based upon the numbers of
 12 UIM PD claims made in the State of Washington under AFM policies during the proposed
 13 class period.

14 **B. Plaintiff Meyer fails to carry his burden under Rule 23(a)’s commonality**
 15 **requirement.**

16 “What matters to class certification . . . is not the raising of common ‘questions’—
 17 even in droves—but, rather the capacity of a classwide proceeding to generate common

18 ///

19
 20 5 (W.D. Wash., Mar. 13, 2009) (Leighton, J.); *Gustavson v. Wrigley Sales Company*, 961 F.
 21 Supp. 2d 1100, 1133 (N.D. Cal. 2013) (dismissing allegations that the “[d]efendants were
 22 juridically linked” as “precisely the sort of ‘formulaic recitation[s] of the elements of a cause
 23 of action,’ that the Supreme Court has warned are insufficient.”); *Huynh v. Chase*
Manhattan Bank, 465 F.3d 992, 1001, n. 7 (9th Cir. 2006); *Hovenkotter v. Safeco Corp.*,
 2009 WL 6698629, 4, 5 (W.D. Wash., Aug. 3, 2009); *Akaosugi v. Benihana Nat. Corp.*, 2011
 WL 5444265, 2 (N.D. Cal., Nov. 9, 2011).

24 ⁴⁰ *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.), amended by, 273
 25 F.3d 1266 (9th Cir. 2001).

26 ⁴¹ Pl.’s Mot at 17. While the First Amended Complaint includes a request for declaratory and
 injunctive relief in the prayer, Meyer makes no showing to attempt to satisfy either Rule
 23(b)(1) or (2).

1 *answers* apt to drive the resolution of the litigation.”⁴² Not every issue in the case must be
 2 common to all class members, however, the relevance of the common questions to the factual
 3 and legal issues at the core of the purported class claims is that *they must be applicable in the*
 4 *same manner to every member of the class* and sufficiently important that those common
 5 issues of law or fact may be said to be “apt to drive the resolution of the litigation.”⁴³

6 “Commonality, within the meaning of Rule 23, requires plaintiff to demonstrate that
 7 the claims of all class members depend on ‘a common contention’ of such nature as ‘is
 8 capable of classwide resolution.’ . . . The test is whether the determination of the truth or
 9 falsity of such common contention ‘will resolve an issue that is central to the validity of each
 10 one of the claims in one stroke.’”⁴⁴ Conversely, “[d]issimilarities within the proposed class
 11 are what have the potential to impede the generation of common answers.”⁴⁵

12 In *Wal-Mart*, the plaintiffs’ challenged what they alleged were discriminatory
 13 employment decisions based on gender in violation of Title VII of the Civil Rights act of
 14 1964, where Wal-Mart’s publicly announced policy forbade discrimination. Wal-Mart
 15 permitted store managers to exercise discretion and to apply their own subjective criteria
 16 when selecting candidates for promotion. Commonality requires a plaintiff to demonstrate
 17 that class members have suffered the same injury, but, as the Court explained,

18 [t]his does not mean merely that they have all suffered a
 19 violation of the same provision of law. Title VII, for example,
 20 can be violated in many ways – by intentional discrimination, or
 21 by hiring and promotion criteria that result in disparate impact,
 22 and by the use of these practices on the part of many different
 23 superiors in a single company. Quite obviously, the mere claim
 24 by employees of the same company that they have suffered a

25⁴² *Wal-Mart, supra*, 131 S. Ct. at 2551.

26⁴³ *Id.*

⁴⁴ *O’Hearn v. Les Schwab Warehouse Center*, 2014 WL 6654207, 4 (W.D. Wash., Nov. 24, 2014) (quoting *Wal-Mart, supra*, 131 S. Ct. at 2551).

⁴⁵ *Wal-Mart, supra*, 131 S. Ct. at 2551 (quoting Richard A. Nagareda, “Class Certification in the Age of Aggregate Proof,” *N.Y.U.L. Rev.* 97, 103 (2009)).

1 Title VII injury, or even a disparate impact Title VII injury,
 2 gives no cause to believe that all their claims can productively
 3 be litigated at once.⁴⁶

4 The Supreme Court in *Wal-Mart* looked for “some glue holding the alleged reasons
 5 for all those decisions together,” and concluded it would be impossible to say that
 6 examination of all the class members’ claims for relief” would produce “a common answer
 7 to the crucial question [‘why I was disfavored.’]” “In order to show that examination of the
 8 class claims would ‘produce a common answer to the crucial question’ of why each
 9 employee was disfavored, the plaintiffs needed to present ‘significant proof’ that Wal-Mart
 10 ‘operated under a general policy of discrimination.’”⁴⁷ Therefore, the Court held that
 11 granting certification of a class would thwart the purpose of the commonality requirement
 12 where “demonstrating the invalidity of one manager’s use of discretion [would] do nothing
 13 to demonstrate the invalidity of another’s.”⁴⁸

14 Here, if presented with a claim for diminished value loss under the UIM PD coverage,
 15 AFM’s practice is to pay substantiated diminished value claims.⁴⁹ Yet in the attempt to meet
 16 his burden, Plaintiff Meyer portrays UIM claims adjustment process as “an automated and
 17 computerized diminished value program called ‘Autosource.’”⁵⁰ Meyer claims that
 18 proceeding as a class is allegedly appropriate because “American Family’s conduct has been
 19 uniform throughout the Class Period, and it has impacted all members of the proposed Class
 20 in a common and similar manner as to how it affected [the named] Plaintiffs.”⁵¹

21 ⁴⁶ *Wal-Mart*, *supra*, 131 S. Ct. at 2551.

22 ⁴⁷ *Id.* at 2552-53.

23 ⁴⁸ *Id.* at 2252, 2254.

24 ⁴⁹ Bennett Dec, Exhibit 3 at 14:5-24.

25 ⁵⁰ Pl’s Mot at 6.

26 ⁵¹ Bennett Dec, Exhibit 2 at 6:15-7:1.

1 Just as alleging that the employees suffered a Title VII violation was insufficient to
 2 meet the commonality requirement in *Wal-Mart*, alleging that all of the policyholders in the
 3 proposed class were “adversely affected” by an alleged breach of a common provision of
 4 auto insurance contracts and by alleged “diminished value avoidance policies,” does not give
 5 any cause to believe that all of the claims in this proposed class can be fairly or manageably
 6 litigated in one proceeding.

7 In *Heaphy v. State Farm Mut. Auto. Ins. Co.*, 117 Wash. App. 438, 72 P.3d 220
 8 (2003), *rev. denied*, 150 Wash.2d 1037, 84 P.3d 1230 (2004) (Table), the defendant auto
 9 insurance company paid the cost to repair its insured’s vehicle, but disputed her claim that
 10 she was owed additional DV damage under its (UIM) coverage.⁵² State Farm conceded that
 11 the UIM endorsement provided coverage for diminished value damages, but denied that the
 12 insured had adequately shown that the proposed diminished value damages were reasonable
 13 and necessary.⁵³ State Farm asked the insured to provide an estimate or a detailed list of
 14 each item that was incorrectly repaired or not repaired at all. Rather than cooperate, the
 15 insured filed a class action lawsuit alleging that State Farm “did not pay claims for
 16 diminished value and did not inform its insureds that they had a right to diminished value
 17 payments.”⁵⁴ When State Farm filed a motion to compel arbitration, the trial court held that
 18 State Farm had denied coverage, and denied the motion.⁵⁵ The Washington Court of Appeals

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22⁵² *Heaphy*, 117 Wash. App. at 440.

23⁵³ *Id.* at 443.

24⁵⁴ *Id.* at 440-41. The complaint contained allegations about claims handling similar to the
 25 allegations in this lawsuit. *Heaphy v. State Farm Mut. Auto. Ins. Co.*, 2005 WL 1950244, 1
 (W.D. Wash. Aug. 15, 2005).

26⁵⁵ *Heaphy*, 117 Wash. App. at 440.

1 ruled that the dispute was arbitrable, and reversed⁵⁶ on the ground that “[this was] not a
 2 denial of coverage . . . [r]ather, the question is to what extent, if any, was [the insured’s]
 3 vehicle diminished in value due to the accident with the uninsured motorist. This is a factual
 4 question, not a coverage question”⁵⁷

5 In the proceedings following the arbitration and removal, a new named plaintiff,
 6 Childs, was added. Childs asserted diminished value claims on behalf of a class.⁵⁸ Again,
 7 this Court noted that “[w]hile State Farm was arguably on notice that *Heaphy* disputes its
 8 handling of UIM diminution in value losses,” the factual context of Mr. Childs’ claims were
 9 unique to him, and “the factual context of each plaintiff’s claims is different.”⁵⁹ *Heaphy* is
 10 not dispositive, but it is illustrative of the distinct, individualized issues in a claim
 11 measurement dispute.⁶⁰ This case presents a claim measurement dispute.⁶¹ “[T]he issue is a
 12 factual one: does the evidence show that [the insured’s] vehicle suffered diminished value
 13 damages? If the answer is yes, [the insurance company] has conceded that its policy covers
 14 these damages. Thus [the insured] has no question of law in common with others. And [the
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16⁵⁶ The existence of physical damage, including DV, presented individual issues of fact, not
 17 common coverage questions. *Id.* at 445.

18⁵⁷ *Id.* at 443.

19⁵⁸ In a subsequent proceeding following the arbitration, this Court noted that the Washington
 20 Court of Appeals rejected *Heaphy*’s argument that her claims were amenable to class
 21 treatment. See *Heaphy, supra*, 2005 WL 1950244 at 3, 4.

22⁵⁹ *Id.*

23⁶⁰ *Id.* at 4.

24⁶¹ “Coverage issues concern the contractual duty to pay, who is the insured, the type of risk,
 25 and whether there is an insurance contract at all. . . . Claim disputes relate to factual issues,
 26 *e.g.*, factual questions of liability, injuries, and damages” *Nelson v. Farmers Ins. Co. of
 Washington*, 120 Wash. App. 1027, 2004 WL 341487, 2 (Wash. App. Div. 2, Feb. 24, 2004).
 Some appellate courts have declined to follow *Heaphy* because certification of a class had
 not been sought at the time of the ruling on arbitrability. See, *e.g.*, *Laughlin v. Allstate Ins.
 Co.*, 130 Wash. App. 1018, 2005 WL 2981685, 1 (Wash. App. Div. 2, Nov. 8, 2005), *rev.
 denied*, 157 Wash.2d 1018, 142 P.3d 607 (2006) (unpublished).

1 insured] has not shown that other class members share common issues of fact.”⁶² This issue
 2 is addressed further below.

3 **1. The proposed class period shifts and straddles the defendants’ use of
 4 AutoSource.**

5 “As a threshold matter, the party seeking class certification must demonstrate that an
 6 identifiable and ascertainable class exists. . . . ‘the class sought to be represented must be
 7 adequately defined and clearly ascertainable.’”⁶³ Plaintiff Meyer asks for certification of a
 8 single class by stating that those who were involved in “accidents occurring before March 6,
 9 2008” are excluded from the class. However, in the same pleading, the membership is
 10 defined as those “whose claims were adjusted on or after March 6, 2010;” and, later still,
 11 those whose claims were adjusted after December 16, 2009.”⁶⁴

12 Plaintiff Meyer argues commonality is satisfied by the use of the Autosource tool.
 13 Autosource was not used at all during a significant part of the class period. “Practices that do
 14 not apply during the entire class period across the class cannot provide a common question
 15 tying the class together.”⁶⁵

16 **2. The payment of DV, and decisions regarding the amounts paid, depended
 17 upon a wide variety of factors.**

18 According to Plaintiff Meyer, this case will likely involve “determining if the method
 19 used by AmFam or the proposed regression analysis prepared by Plaintiff’s expert
 20 Dr. Bernard Siskin best reflects the actual [diminished value] of members of the proposed

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⁶² *Heaphy, supra*, 117 Wash. App. at 447-48.
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⁶³ *Daniel F. v. Blue Shield of California*, 2014 WL 3907150, 3 (N.D. Cal. Aug. 11, 2014);
 25 See also *Fosmire v. Progressive Max Ins. Co.*, 277 F.R.D. 625, 636 (W.D. Wash. 2011).

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⁶⁴ Bennett Dec, Exhibit 2 at 7:21-22; 9:11-12; 10:21-22.

⁶⁵ *Dukes v. Wal-Mart Stores*, 964 F. Supp. 2d 1115, 1126 (N.D. Cal. 2013).

1 Class.”⁶⁶ There was no uniform, centrally-established formula or practice for adjustment of
 2 diminished value claims during the proposed class period.⁶⁷ American Family Mutual
 3 employed other methods to assess diminished value loss during the class period both prior to
 4 the introduction of AutoSource, and thereafter.

5 For example, a spreadsheet entitled “Diminished Value Schedule”⁶⁸ that provided
 6 percentages (ranging from 1% to 40%) of the actual cash value (ACV) of the vehicle and the
 7 estimated cost of repairs was “one of the things” used to guide adjusters in arriving at “which
 8 number seemed appropriate in that particular case” to pay for diminished value.⁶⁹ Once
 9 introduced, the results from the AutoSource program did not determine the amount of DV.⁷⁰

10 Since December 2009 or early 2010, AFM adjusters sent a letter⁷¹ to insureds with a
 11 checklist of information to seek in assessing DV.⁷² Information was sought from the owner,
 12 including the owner’s description of the damage and information about prior damage,⁷³ and
 13 copies of repair invoices. Adjusters also considered information in NADA guides.⁷⁴

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⁶⁶ Pl’s Mot at 2:26-28.

⁶⁷ Bennett Dec, Exhibit 10 at 6:10-13; Exhibit 3 at 13:9-23.

⁶⁸ Bennett Dec, Exhibit 3 at 4:16-21; Exhibit 29.

⁶⁹ Bennett Dec, Exhibit 3 at 5:5-16; 6:3-6, 19-25; 7:1-5; 8:5-21, 23; 9:1-10:2; 12:13-13:8.

⁷⁰ Bennett Dec, Exhibit 3 at 15:16-20; Bennett Dec, Exhibit 10 at 7:3-15; Bennett Dec, Exhibit 4 at 11:3-22.

⁷¹ Bennett Dec, Exhibit 18.

⁷² Bennett Dec, Exhibit 4 at 3:19-4:1-12; 12:10-18; Exhibit 19; Pl’s Mot at 8]

⁷³ Bennett Dec, Exhibit 10 at 7:16-23; 13:4-7; 14:15-19.

⁷⁴ Bennett Dec, Exhibit 3 at 3:11-14.

1 maintenance records,⁷⁵ searches of the Insurance Service Office (ISO) database,⁷⁶ records of
 2 post-accident sales;⁷⁷ photographs and repair estimates;⁷⁸ dealership evaluations of the trade-
 3 in value;⁷⁹ the results of a value rating questionnaire provided by Kelley Blue Book, that
 4 includes questions concerning the impact of prior repairs on the valuation rating;⁸⁰ owner-
 5 supplied appraisals;⁸¹ and other value rating guides.⁸² Decisions on DV claims are and have
 6 been the result of a collaborative process.⁸³ Proceeding as a class will not yield common
 7 answers regarding who was owed DV, or how much, or how any particular claim was
 8 handled as to DV.

9 **C. Plaintiff Meyer fails to carry his burden under Rule 23(a)'s typicality**
 requirement.

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 11 Typicality has been interpreted to mean that “a class representative must be part of the
 12 class and ‘possess the same interest and suffer the same injury’ as the class members.”⁸⁴
 13 Plaintiff Meyer alleges that the questions of law and fact common to all members of the
 14 proposed Class include “[w]hether American Family committed consumer fraud and acted in

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 17⁷⁵ Bennett Dec, Exhibit 4 at 13:11-19; 14:12-22; 15:6-21; 16:2-11; 17:21-18:13.

18⁷⁶ Bennett Dec, Exhibit 3 at 18:3-9; Bennett Dec, Exhibit 4 at 6:4-15; 8:17-22; Exhibit 10 at
 12:9-22.

19⁷⁷ Bennett Dec, Exhibit 4 at 9:8-15.

20⁷⁸ Bennett Dec, Exhibit 4 at 19:2-17.

21⁷⁹ Bennett Dec, Exhibit 10 at 9:21-10:23; 11:10-23.

22⁸⁰ Bennett Dec, Exhibit 10 at 7:24-8:16.

23⁸¹ Bennett Dec, Exhibit 4 at 10:17-20.

24⁸² Bennett Dec, Exhibit 10 at 9:1-13.

25⁸³ Bennett Dec, Exhibit 4 at 10:21-23.

26⁸⁴ *Wal-Mart, supra*, 131 S. Ct. at 2550.

1 bad faith thereby violating RCW 48.03.040 and .090” and by *failing to pay DV losses.*⁸⁵
 2 “The test for typicality ‘is whether other members have the same or similar injury, whether
 3 the action is based on conduct which is not unique to the named plaintiffs, and whether other
 4 class members have been injured by the same course of conduct.”⁸⁶

5 Plaintiff Meyer’s claim is not typical of those of all of the members of the proposed
 6 class. Plaintiff Meyer knew he could assert a DV element of loss, and he received a payment
 7 for diminished value. Other policyholders did not. Plaintiff Meyer alleges that the
 8 defendants failed to disclose coverage for diminished value. He argues that he is “*one of the*
 9 *few AmFam insureds . . . knowledgeable enough to even mention [diminished value]*” in
 10 making a claim under the policy.⁸⁷

11 Typicality requires that a class representative “have the incentive to prove all the
 12 elements of the cause of action which would be presented by the individual members of the
 13 class were they initiating individualized actions.”⁸⁸ Mr. Meyer’s claim was adjusted as a hit-
 14 and-run. Where the damages result from a hit-and-run or a “phantom vehicle” accident, the
 15 claim is adjusted as though the other driver was at fault and uninsured.⁸⁹ In other types of
 16 accidents, however, the comparative fault of some of the members in the class proposed here

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⁸⁵ Bennett Dec, Exhibit 2 at 8:3-6. Emphasis supplied.

⁸⁶ *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

⁸⁷ Pl’s Mot at 8. Emphasis supplied; Bennett Dec, Exhibit 7 at 27:4-14.

⁸⁸ *In re NASDAQ Market-Makers Antitrust Litig.*, 172 F.R.D. 119, 126 (S.D. N.Y. 1997).

⁸⁹ However, there may be real party in interest issues due to the loss payable provision. Bennett Dec, Exhibit 5 at 5, ¶ G, sub¶ 3.a. Also, Mr. Meyer provided his lender with a security interest in . . . the vehicle and all parts or goods put on it; [and] *all money or goods received (proceeds) for the vehicle.*” Bennett Dec, Exhibit 20 at 3, ¶ 2, sub¶¶ a, c, d.

1 may affect what an insured is ‘entitled to recover’ from an uninsured or an underinsured
 2 motorist.⁹⁰

3 Also, there are different joinder and notice issues within the proposed class where the
 4 terms of the UIM endorsement state, in part, as follows: “If any suit is brought by **you** to
 5 determine liability or damages, the owner or operator of the **underinsured motor vehicle**
 6 must be made a defendant and **you** must notify **us** of the suit.”⁹¹ In an earlier attempt by a
 7 Washington resident to bring a nationwide DV class against these defendants in Wisconsin,⁹²
 8 AFM raised defenses, including this notice and joinder issue. Judge Crab found that joining
 9 the tortfeasor was a condition precedent to plaintiff’s ability to sue under the contract. The
 10 matter was thereafter compromised and dismissed, without class certification being reached.

11 “[C]lass certification is inappropriate where a putative class representative is subject
 12 to unique defenses which threaten to become the focus of the litigation.”⁹³ Ms. Bower gave
 13 American Family Mutual notice of her DV claim. Plaintiff Meyer did not.⁹⁴ When asked for

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17 ⁹⁰ Washington’s application of ‘pure’ comparative fault to negligence actions means that
 18 “any contributory fault chargeable to the claimant diminishes proportionately the amount
 19 awarded as compensatory damages for any injury attributable to the claimant’s contributory
 20 fault.” *Hai v. STL Intern., Inc.*, 180 Wash. App. 1026, 2014 WL 1494107, 4 (Wash. App.
 21 Div. 2 Apr. 15, 2014); RCW 4.22.005.

22 ⁹¹ Bennett Dec, Exhibit 5 at 7, ¶ C, sub¶ 3.

23 ⁹² *Maryanouskiy v. American Family Mutual Ins. Co. and Sharon Wimpress*, U.S. District
 24 Court for the Western District of Wisconsin, 11-cv-106-bbc.

25 ⁹³ *Hanon v. Dataproducts Corp.*, *supra*, 976 F.2d at 508; *Ellis v. Costco Wholesale Corp.*,
 26 657 F.3d 970, 984 (9th Cir. 2011).

27 ⁹⁴ The Mustang had been damaged in a second accident by the time Plaintiff Meyer gave
 28 notice of his DV claim. His diminished value expert, Mr. Harber, acknowledged that
 29 multiple accidents “make[] it a little more difficult to separate out what’s – you know, who’s
 30 responsible for what, *but it isn’t really that unusual.*” Bennett Dec, Exhibit 9 at 3.

1 any evidence in support of payment of a different amount for DV, Mr. Meyer did not
 2 cooperate.⁹⁵

3 **D. Plaintiff Meyer fails to carry his burden under Rule 23(a)'s adequacy**
 4 **requirement.**

5 Rule 23(a)(4) requires Plaintiff Meyer to show that he “will fairly and adequately
 6 protect the interests of the class.” The court must consider whether the proposed class
 7 representative has “any conflicts of interest with other class members” and whether the
 8 proposed class representative will “prosecute the action vigorously on behalf of the class.”⁹⁶

9 Meyer has conflicts of interest with other members of the proposed class. Here,
 10 Plaintiff Meyer insisted that Barrett’s did not completely or properly repair the damage to the
 11 Mustang from the April 14, 2014 incident. According to Plaintiff’s DV expert, this type of
 12 damage may be present “beyond . . . [the] collision-related diminished value” property
 13 damage caused by a collision with the uninsured motorist where that damage is left
 14 “unrepaired,” and “require[d] that the vehicle either be estimated, or reestimated, so that the
 15 sum necessary to repair the vehicle to industry standards can be determined, or it can be
 16 determined that the vehicle is (or should be) a total loss.”⁹⁷

17 Individual vehicle inspections would be required to determine the numbers of other
 18 members of the proposed class who have similar repair-related claims under the UIM PD
 19 coverage. The defendants’ alleged liability to the insureds is for unrepaired physical damage

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23 ⁹⁵ Bennett Dec, Exhibit 12 at 2. Ms. Bower also ignored compliance with a request for her
 24 cooperation in a request to support her DV claim. Bennett Dec, Exhibit 16.

25 ⁹⁶ *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1031 (9th Cir. 2012); *Hanlon v.*
 26 *Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

27 ⁹⁷ Bennett Dec, Exhibit 22 at 3, n. 1.

1 or repair work that failed to restore the vehicles to their pre-accident condition.⁹⁸
 2 Distinguishing between diminished value damages and unrepainted but repairable damages
 3 raises “[t]he question of whether the damaged property is capable of restoration, or has been
 4 restored, to substantially the same value and condition as it had before the accident is a
 5 question of fact to be determined by the jury or factfinder.”⁹⁹

6 Meyer decided not to pursue any such claims in this lawsuit on behalf of the other,
 7 unnamed members of the class.¹⁰⁰ Instead, Mr. Meyer’s public adjuster/expert, Mr. Harber,
 8 invoked “appraisal” (the contractual dispute resolution method under the UIM coverage is
 9 arbitration). Plaintiff Meyer elected to pursue damages for his claim arising out of the
 10 unrepainted physical damage to the Mustang sustained in the same accident as the alleged
 11 diminished value damage, but in a separate proceeding, and in a separate forum.¹⁰¹

12 Rule 23(a)(4) requires that the representative parties will fairly and adequately protect
 13 the interests of the prospective class because any judgment conclusively determines the
 14 rights of absent class members.¹⁰² A plaintiff’s ““strategic claim-splitting decision creates a

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 16 ⁹⁸ “The restoration of a covered auto to its pre-loss condition requires that an insured be
 17 compensated for all physical damage incurred, to include, for example, unrepainted dents,
 18 bends or stress to the vehicle’s structure, and damage to the function or appearance of the
 19 vehicle.” *Degenhart v. AIU Holdings, Inc.*, *supra*, 2010 WL 4852200 at 5. Claims based on
 allegedly unrepainted damages or improperly performed repair work interject factual issues
 related to the quality of the work in individual instances in addition to the potential of raising
 different legal grounds (such as warranties of the repair shop’s work) for liability. Bennett
 Dec, Exhibit 4 at 5:3-12; 7:15-23.

20 ⁹⁹ *Government Employees Ins. Co. v. Bloodworth*, 2007 WL 1966022, 42 (Tenn. App.,
 21 June 29, 2007). “[T]he plaintiff must prove that the property is not capable of repair that will
 22 substantially restore its condition, appearance, and value or that the repairs made did not
 substantially restore them.” *Id.* at 41.

23 ¹⁰⁰ Bennett Dec, Exhibit 23 at 2.

24 ¹⁰¹ “[C]laim splitting – is precluded in Washington.” *Ensley v. Pitcher*, 152 Wash. App. 891,
 25 898, 222 P.3d 99 (2009), *rev. denied*, 168 Wash.2d 1028, 230 P.3d 1060 (2010); *Berschauer*
Phillips Const. Co. v. Mutual of Enumclaw Ins. Co., 174 Wash. App. 1068, 2013 WL
 1901071, 2 (Wash. App. Div. 1, May 6, 2013).

26 ¹⁰² *Eisen v. Carlisle and Jacqueline*, 391 F.2d 555, 562 (2nd Cir. 1968).

1 conflict between Plaintiff's interests and those of the putative class, and renders Plaintiff an
 2 inadequate class representative.”¹⁰³ When claim splitting occurs in the context of a class
 3 that seeks monetary damages, “concerns about preclusion are much more significant,” and
 4 courts “have refused to certify classes based on conflicts of interest between the named
 5 plaintiff and the absent class members.”¹⁰⁴ Failing to seek full damages suggests the
 6 individual seeking to be named as the representative of a class is an inadequate representative
 7 of the class—sacrificing claims that unnamed class members are entitled to expect the named
 8 representative will diligently prosecute those claims on their behalf. Plaintiff Meyer's
 9 decision puts members of the class at risk of having similar damage claims foreclosed.

10 Also, absent members of the class are adversely affected by what appears to be an
 11 election by Mr. Meyer not to pursue amounts in damages that the other members of the class
 12 might choose to seek if they were in control of the litigation. Depending upon which of
 13 Dr. Siskin's opinions regarding Plaintiff Meyer's loss of value is selected, Mr. Harber's
 14 \$11,200 assessment of Plaintiff Meyer's Mustang diminished value loss¹⁰⁵ is nearly double
 15 \$5,473.21 (95.57%) or more than double, \$5,858.39 (109.67%), the results of applying
 16 Dr. Siskin's formula selected to advance presentation of these claims as a class. For the
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21 ¹⁰³ *Fosmire*, *supra*, 277 F.R.D. at 634 (denial of certification of a diminished value class, and
 22 quoting *Sanchez v. Wal Mart Stores, Inc.*, 2009 WL 1514435, 3 (E.D. Cal., May 28, 2009),
 23 where plaintiff's counsel chose to limit the class claims to economic injury and not to pursue
 personal injury claims on behalf of class members).

24 ¹⁰⁴ *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2012 WL 273883, 3, n. 5 (N.D. Cal.,
 Jan. 30, 2012) (*dicta*); *Schoeman v. New York Life Ins. Co.*, 106 Wash.2d 855, 859, 726 P.2d
 1 (1986); *Landry v. Luscher*, 95 Wash. App. 779, 782, 976 P.2d 1274, *rev. denied*, 139
 Wash.2d 1006, 989 P.2d 1140 (1999).

25 ¹⁰⁵ Bennett Dec, Exhibit 9 at 11:20-25; Exhibit 24 at 2.

1 Bower vehicle, Dr. Siskin's method reduces Collision Consulting's estimate of Ms. Bower's
 2 DV loss by approximately \$3,000 (77%).¹⁰⁶

3 **E. Plaintiff Meyer fails to carry his burden under Rule 23(b)(3)'s requirements**

4 Plaintiff Meyer claims the common questions that "unquestionably predominate" are:

5 whether AmFam established a common course of conduct
 6 designed to avoid paying DV losses it was obligated to pay
 7 under the standardized language of AmFam's form insurance
 policies and whether it fairly and accurately paid those claims it
 was presented.¹⁰⁷

8 Plaintiff Meyer tells this Court that his expert, Dr. Siskin, "will be able to calculate
 9 the amount of diminished value . . . owed [to] those insureds within the Class both Class-
 10 wide **and** for individuals within the Class" by employing his regression analysis, a "sampling
 11 from the Class vehicles," and "building upon his work in *Moeller*" which relies upon what is
 12 now a 13-14 year old database based upon surveys of cars sold at auto auctions to "isolate
 13 the effect of DV on the total value of the vehicle."¹⁰⁸ Defendants challenge Dr. Siskin's
 14 regression analysis and will soon file an ER 702 motion to exclude the testimony.¹⁰⁹

15 "Considering whether 'questions of law or fact common to class members
 16 predominate' begins, of course, with the elements of the underlying cause of action."¹¹⁰ The

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 18¹⁰⁶ Bennett Dec, Exhibit 27 at 6:4-22. The Collision Consulting report offers the opinion that
 19 the DV loss to Ms. Bower's Mini Cooper was \$4,204. Bennett Dec, Exhibit 15 at 1, ¶¶ 1-2;
 20 2, ¶ 5; Exhibit 25 at 2, 3.

21¹⁰⁷ Pl's Mot at 18. Emphasis supplied. Plaintiff Meyer represents that "the *amount* of
 22 [Plaintiff Meyer's and Class Member's] individual and aggregate damages can be calculated
 23 using available, objective information contained in AmFam's own electronic records,
 24 combined with information on market clearing sales prices for damaged and repaired and
 25 undamaged vehicles." *Id.* at 18. Emphasis in original.

26¹⁰⁸ Pl's Mot at 19.

¹⁰⁹ See the expert reports of Dr. Schink and Prof. Ratchford attached to the Bennett
 Declaration as Exhibits 32 and 33. Subject to that reservation, for purposes of this
 opposition, the defendants will treat Dr. Siskin's opinions as admissible.

¹¹⁰ *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184, 180 L.Ed.2d 24
 25 (2011) (quoting Rule 23(b)(3)).

1 underlying purpose of UIM coverage is to give the insured the recovery he or she *would have*
 2 *been entitled to receive* if the uninsured or underinsured other driver had maintained an
 3 adequate policy of liability insurance.¹¹¹

4 Disputes involving claims made under UIM coverage are a hybrid between a contract
 5 case and a tort case. First, in order to recover for breach of contract under the UIM
 6 provisions, a plaintiff/insured is required to prove physical damage to a covered vehicle
 7 suffered in an accident governed by tort law principles, there must be proof of: another
 8 driver's negligence caused an accident, a causal link from the accident to the insured's
 9 damages, and the nature, amount, and extent of those damages established in accordance
 10 with tort law principles.

11 Certification is not defeated solely by the requirement to engage in individualized
 12 damage calculations; however, Rule 23(b)(3)'s predominance requirement requires the
 13 moving party to show that damages are capable of measurement on a classwide basis."¹¹²
 14 Liability for damages for breach of contract is governed by different facts than those that can
 15 be said to be gleaned by the application of Dr. Siskin's regression formula.

16 In *Admasu v. Port of Seattle*, ___ P.3d ___, 2014 WL 5464888 (Wash. App. Div. 1,
 17 Oct. 27, 2014), the plaintiffs alleged that their property and thousands of others sustained
 18 diminished property values due to the Port of Seattle's operation of a runway. The class
 19 plaintiffs argued common issues predominated because they offered expert opinions to
 20 demonstrate "a class-wide, aggregate diminution of property values resulting from airport

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 22
 23 ¹¹¹ "Therefore, . . . insureds may not recover UIM damages when their injuries were caused
 24 by an immune uninsured motorist. See *Sayan v. United Servs. Auto. Ass'n*, 43 Wash. App.
 148, 156-57, 716 P.2d 895 (1986). "UIM insurers are allowed to assert liability defenses
 25 available to the tortfeasor because . . . the injured party is not entitled to be put in a better
Dayton v. Farmers Ins. Group, 124 Wash.2d 277, 281, 876 P.2d 896 (1994) (*dicta*).

26 ¹¹² *Comcast Corp. v. Behrend*, ___ U.S. ___, 133 S. Ct. 1426, 1433, 185 L.Ed.2d 515 (2013).

1 operations . . . which [could] then be apportioned to the individual properties.¹¹³ The
 2 Washington Court of Appeals held that “although the Port’s general actions may be common
 3 to all, liability can likely be established only after examination of the circumstances
 4 surrounding each of the affected properties.”¹¹⁴

5 Plaintiff Meyer has a burden of proof that the answers produced by Dr. Siskin’s
 6 method or formula yields class-wide answers that establish the defendants’ liability for
 7 breach of contract.¹¹⁵ That is a different proposition than simply multiplying Dr. Siskin’s
 8 estimate of “Class wide damages” by “the [c]lass size by the average per claim loss in
 9 value,” and then applying a discount for “the possibility” of prior damage “in the same spot.”
 10 He arrives at percentage reductions in value in this “first step” for “the presence of
 11 frame/structural damage, and each area of damage (‘hit’). Of particular interest to the issue
 12 of whether Meyer satisfies the predominance requirement is the so-called second step (which
 13 Dr. Siskin refers to as “modeling the class”), and “involve[s] applying the results of the
 14 regression analysis to a particular Class *via sampling of claims files* to determine the total
 15 Class wide damages through *aggregating the individual damages* of those in the sample, and

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19 ¹¹³ *Id.* at 3.

20 ¹¹⁴ *Id.* at 2, 3; see also *Franklin v. Government Employees Ins. Co.*, 2011 WL 5166458, 8
 21 (W.D. Wash., Oct. 31, 2011) (denying certification of a Washington-only, diminished value
 22 class where “each class member has presumptively made a claim on a unique vehicle that has
 23 been involved in a unique accident. Even if the occurrence of irreparable physical damage
 24 was a common question among the class, this issue does not predominate over the individual
 25 extent of each class member’s damage.”)

26 ¹¹⁵ Dr. Siskin describes the second step in a May 16, 2013 Supplemental Disclosure made in
 27 one of the filings for *Moeller*, and attached as Exhibit B to his declaration, here. It is worth
 28 noting here that the data relied upon by Dr. Siskin for the regression estimate, and the
 29 method of the regression, are unreliable and produce unreliable results. *See* Bennett Dec.,
 30 Exhibit 32 at 6-12 and Exhibit 33 at 7-11, for a summary of the issues with the regression
 31 analysis.

1 addressing any issues that might reduce damages in an individual case, such as prior
 2 overlapping damage.”¹¹⁶

3 Dr. Siskin illustrates how he “models” the Class by referring to a supplemental
 4 disclosure filed in *Janhunen v. Farmers Ins. Co.* that has been attached to his December 15,
 5 2014 declaration.¹¹⁷ He calculated individual damages for three of Farmers’ insureds based
 6 upon “copies of the repair estimates,” assessments of “the existence of frame/structural
 7 damage” and the “number of spots . . . for each” vehicle. The average of the “loss in value”
 8 amounts in the sample is then subtracted from the “pre-loss valuations” of each of the
 9 vehicles, and that figure is multiplied by the class size.

10 Dr. Siskin broadly states that “the formula used to determine those damages can be
 11 applied on a [claim-by-claim basis] in a distribution phase if it is needed.”¹¹⁸ Dr. Siskin
 12 offers Plaintiff Meyer’s vehicle as an illustration. Again, he is given “NADA clean retail
 13 value at the time of the accident,” the conclusion that Plaintiff Meyer’s vehicle “suffered
 14 frame/structural damage,” and that the vehicle had “eleven areas of damage.” Then, based
 15 upon how one chooses to count the number of hits, Dr. Siskin offers *two different figures* for
 16 Plaintiff Meyer’s loss of value.¹¹⁹ The \$385.15 difference represents a 7.2% disparity in
 17 what Plaintiff Meyer claims he is entitled to recover – based solely on different counts of the
 18 hits. Those discrepancies are substantial when multiplied by the proposed class size.

19 Dr. Siskin rests his diminished value opinion regarding Plaintiff Meyer’s Mustang (on
 20 a count of 11 hits. Mr. Harber counts 12 hits.¹²⁰ When asked how “hits” were counted for

21 ¹¹⁶ Bennett Dec, Exhibit 26 at 2, ¶ 2.

22 ¹¹⁷ *Janhunen v. Farmers Ins. Co.*, Washington Superior Court (Pierce County) Case No. 99-
 23 2-07850-6; Bennett Dec, Exhibit 26 at 3, ¶ 5; 6-7. ¶¶ 15-19.

24 ¹¹⁸ Bennett Dec, Exhibit 26 at 4, ¶ 8.

25 ¹¹⁹ Bennett Dec, Exhibit 26 at 5, ¶ 12.

26 ¹²⁰ Bennett Dec, Exhibit 9 at 7; 8:14-9:2; 10.

1 purposes of Dr. Siskin's model, Plaintiff's DV expert, Mr. Harber,¹²¹ explained that "it's
 2 important to distinguish between the way I do it and the way that the damage model for this
 3 class is set up. . . . I do it differently on an individual basis"¹²² Individual DV
 4 assessments yield different amounts than the classwide assessment Meyer proposes here.¹²³

5 Dr. Siskin's formula (and the class definition, here) also depends upon what he is told
 6 about the presence of frame damage. That can be a matter of disagreement. The DV report
 7 on Ms. Bower's Mini Cooper by former-plaintiff Jeff Butler observed "No frame/unibody
 8 repairs or replacement listed." Mr. Harber disagrees.¹²⁴ So does Dr. Vogler, defendants'
 9 automotive expert.¹²⁵

10 Next, based upon his "visual inspection" of Plaintiff Meyer's Mustang, Mr. Harber
 11 states that the vehicle "shows the areas of repair, and moreover shows that the vehicle has
 12 suffered frame damage."¹²⁶ Yet his inspection to determine DV apparently missed the
 13 modifications Mr. Meyer and a friend made to the Mustang before the April 2014 damage.¹²⁷

14 According to Mr. Harber, "a lot of people" customize their cars. He only considers
 15 manufacturers' options, because other modifications "make[] it very difficult because the
 16 value that somebody else places on an upgrade may or may not be what the marketplace
 17

18 ¹²¹ See Bennett Dec, Exhibit 22 at 2:25-3:2. Mr. Harber does "hundreds" of diminished
 19 value assessments in a given year. Bennett Dec, Exhibit 9 at 20:12-21:19; 23:7-11, 21-25;
 20 24.

21 ¹²² Bennett Dec, Exhibit 9 at 4:24-5:7, 11-14; 6:22-25.

22 ¹²³ Dr. Vogler addresses the uncertainty and questions of expert opinion in trying to apply
 23 Dr. Siskin's formula. See Bennett Dec., Exhibit 31 at 5-9 (¶¶ 13, 17, 21-24).

24 ¹²⁴ Bennett Dec, Exhibit 25 at 2; Bennett Dec, Exhibit 9 at 17:5-18:4; 19:12-14.

25 ¹²⁵ Bennett Dec, Exhibit 31.

26 ¹²⁶ Bennett Dec, Exhibit 22 at 4:5-6.

¹²⁷ "[T]hat's the first time I ever heard of that." Bennett Dec, Exhibit 9 at 12:3-8; 14:1-3.

1 would value it.”¹²⁸ An inspection would be needed to determine the DV loss “[i]f
 2 [customizing the vehicle] was something that [the owner] was doing himself, then I would
 3 think that it would be necessary, but when he’s got receipts and they were done by a
 4 reputable business that does those type[s] of installations, then . . . I’m going to assume that
 5 everything is done properly and that it . . . adds to the value.”¹²⁹ On the other hand, while
 6 Dr. Siskin was willing to concede that “perhaps” modifications would affect valuations, no
 7 data was collected. The impact of modifications is not addressed in his model because “you
 8 have to not only assume that it affects [the value], but you have to assume that it’s related to
 9 *the likelihood of being in an accident* and having it fixed.”¹³⁰

10 Mr. Harber does not refer to Dr. Siskin’s damage model when he makes a DV
 11 evaluation “on an individual basis”¹³¹ because “before and after value is not a formula.”¹³²
 12 Under a breach of contract theory, Plaintiff Meyer is now claiming that the defendants are
 13 liable to pay him an uncertain additional amount (the alternative Dr. Siskin assessments
 14 minus what has been paid) while leaving behind a potentially far greater DV loss as found by
 15 Mr. Harber. Plaintiff Meyer’s two diminished value experts apply different methods and

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19 ¹²⁸ Bennett Dec, Exhibit 9 at 12:9-13:7, 17-23.

20 ¹²⁹ Mr. Harber cited an example of where a “reputable dealer” installed a \$14,000
 21 conversion kit and an \$8,900 audio system at the time the vehicle was purchased, and
 22 Mr. Harber felt applying “normal depreciation” to the cost of modifications would be a
 23 “reasonable method” of addressing the valuation issue. Bennett Dec, Exhibit 9 at 14:11-
 24 15:15. “No responsive materials exist” was the response when Meyer was asked to produce
 25 records of “changes made to” the Mustang. Bennett Dec, Exhibit 21 at 6-7, Nos. 36-37.

26 ¹³⁰ Bennett Dec, Exhibit 27 at 8:18-10:14. Emphasis supplied.

¹³¹ In Mr. Harber’s opinion, the Mustang sustained a \$11,200 DV loss. Bennett Dec,
 25 Exhibit 9 at 11:9-10, 20-25; 21:19-25; Exhibit 24 at 2.

¹³² Bennett Dec, Exhibit 9 at 2:5-9, 13-20; 22:15-25; 26:3-21; 28:2-5.

1 reach dramatically different opinions on the same question when considering individual
 2 vehicles in the proposed class.¹³³

3 Dr. Siskin offers his confidence that the necessary information “is available in a
 4 computerized format from American Family and its estimating system Audatex” based upon
 5 five pages of testimony from the deposition of Mr. Wade Nielson,¹³⁴ and Dr. Siskin’s vague
 6 statement that he has “knowledge from prior cases as to the availability of estimating
 7 data.”¹³⁵ The breach of an alleged contractual obligation to pay under the UIM coverage
 8 requires a determination of the DV amount of loss the plaintiff would be entitled to recover
 9 from a tortfeasor (with the identified tortfeasor made a party to the lawsuit and bound by it)
 10 less any amounts already paid by the tortfeasor,¹³⁶ any amounts already paid by the UIM
 11 insurer,¹³⁷ the percentage of fault allocated to the insured, the appropriate deductible,¹³⁸

12 _____
 13¹³³ Mr. Harber’s \$11,200 assessment of Plaintiff Meyer’s Mustang diminished value loss is
 14 nearly double \$5,473.21 (95.57%) or more than double, \$5,858.39 (109.67%) the results of
 15 applying Dr. Siskin’s formula.

16¹³⁴ Repair estimates, amounts actually paid for repairs, even the deductibles applied, is
 17 available in the individual claim files. Bennett Dec, Exhibit 3 at 21:23-25; 22:20-23:6.
 18 However, DV payments are not separately stated, nor are they readily ascertainable without
 19 reviewing all of the notes in each claim file. Bennett Dec, Exhibit 10 at 15:21-16:13;
 20 Exhibit 28 at 1.

21¹³⁵ Bennett Dec, Exhibit 26 at 4, ¶ 8.

22¹³⁶ “UIM coverage applies when the sum of the limits of applicable property damage liability
 23 policies is less than the damage which the covered person is entitled to recover from the
 24 tortfeasor.” *Dehaan v. Farmers Ins. Co. of Washington*, 172 Wash. App. 1047, 2013 WL
 25 223514, 3 (Wash. App., Div. 1 Jan. 22, 2013) “Even though [the auto insurer] may not have
 26 included an amount specifically for diminished value in its payment of a claim, it is
 conceivable that the amount it paid a particular insured may, in fact, have exceeded the total
 amount (including diminished value) that [the] insured could have recovered from the third
 party tortfeasor.” *Government Employees Ins. Co. v. Bloodworth, supra*, 2007 WL 1966022
 at 48.

27¹³⁷ See Bennett Dec, Exhibit 27 at 3:2-20; 7:3-21. “Even if the plaintiff were able to show
 28 that classwide proof of eligibility for an award of diminished value, the fact that all vehicles
 29 described in the class definition suffered a decrease in value does not necessarily prove that
 30 GEICO failed to pay any particular insured less than he or she was entitled to from the
 31 uninsured motorist.” Paying the cost to repair the insureds’ vehicles does not waive the
 32 differences in the allocation of fault attributable to the insureds in a proposed class, or make
 33 those differences irrelevant. *Bloodworth, supra*, 2007 WL 1966022 at 47.

1 considering contractual “other insurance” provisions,¹³⁹ and subject to the contractual limit
 2 of liability for the UIM coverage. Plaintiff Meyer fails to show that common answers to the
 3 issues he identifies as predominant will fairly be reached by applying a regression analysis
 4 that does not account for these procedural and damage issues.

5 As the party moving for class certification, Plaintiff Meyer also has the burden of
 6 proving that proceeding as a class is a superior way to determine if members of the class are
 7 entitled to money damages. In some cases, the amounts at issue are relatively small and
 8 aggregating the claims is seen as necessary to motivate an individual plaintiff to pursue a
 9 remedy. Here, the disputed amounts range from \$5,400 to more than \$11,000.¹⁴⁰

10 Courts applying Washington law “distinguish between diminished value loss
 11 (irreparable physical damage) and stigma damages (intangible taint) . . . , but [do] so with the
 12 understanding that the definition of diminished value loss requires *demonstrable* physical
 13 damage.”¹⁴¹ Plaintiff Meyer denies he is seeking stigma damages. However, before
 14 reaching the issue of whether Plaintiff Meyer is entitled to payment of any amount above the
 15 amount AFM has paid, that disclaimer of stigma damage is illusory unless Plaintiff Meyer
 16 carries his burden to prove the existence of physical damage remaining after the repairs,¹⁴²

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 18
 19¹³⁸ The damage sustained must exceed the applicable deductible before there is contractual
 20 liability to pay. Dr. Siskin’s model does not account for the deductible or allocation of fault.
 Bennett Dec, Exhibit 27 at 3:2-20; 4:6-5:14. Within the UIM PD coverage, there are
 differences in the applicable deductibles. Bennett Dec, Exhibit 5 at 7, ¶ D, sub¶¶ 3, 4.

21¹³⁹ Where members of the purported class may have had other insurance available or who
 22 had accidents with an underinsured driver the “other insurance” provision of the policy
 23 would affect whether and what amounts were owed. Bennett Dec, Exhibit 5 at 8 ¶ F, sub¶ 1.

24¹⁴⁰ In Mr. Harber’s experience, those amounts in dispute have been sufficient to prompt
 25 individuals to litigate. Bennett Dec, Exhibit 9 at 25:8-13.

26¹⁴¹ *Mansker v. Farmers Ins. Co. of Washington*, 2010 WL 3699856, 7 (W.D. Wash., Sept. 14,
 2010) (not reported)

¹⁴² *Degenhart v. AIU Holdings, Inc.*, *supra*, 2010 WL 4852200 at 5.

1 and to distinguish the alleged diminished value damages from stigma damages¹⁴³ as well as
 2 the damages left unrepaired or that were improperly repaired.¹⁴⁴

3 The UIM endorsement provides that “[i]f we and an **insured person** do not agree
 4 whether that **insured person** is legally entitled to recover damages, or as to the amount of
 5 damages which are recoverable by the **insured person** from the owner or operator [of] an
 6 **underinsured motor vehicle**, then the matter may be arbitrated.”¹⁴⁵ Apparently, for
 7 strategic reasons related to advancing the motion to certify or only to enhance his recovery,
 8 Plaintiff Meyer concluded the method provided in his insurance contract to address disputed
 9 claims under the UIM PD coverage was superior – if allowed to divide his claimed damages.

10 Save the statement that “the claims handling practices that Plaintiff challenges are
 11 uniformly implemented,”¹⁴⁶ Plaintiff Meyer does not attempt to demonstrate proceeding as a
 12 class is a superior means to litigate the elements of a CPA violation.¹⁴⁷ AFM does not
 13 inform its insureds of the potential for a DV claim and believes it has no obligation to do
 14 so.¹⁴⁸ AFM is not required to presume DV occurred in every accident or that the insured

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 17 ¹⁴³ “[T]he definition of diminished value in Washington does not include stigma damage” *Id.*

18
 19 ¹⁴⁴ “The prevalence of individual issues” in the *Admasu* decision denying that a class was a
 20 superior means to adjudicate those DV claims was underscored “when one of the plaintiffs’
 21 experts suggested appraisals might be utilized as part of the class action proceeding. This
 22 raised the specter of hundreds or thousands of appraisals that would be conducted.” *Admasu*,
 23 *supra*, 2014 WL 5464888 at 4, n. 24.

24 ¹⁴⁵ Bennett Dec, Exhibit 5 at 8, ¶ F, sub ¶ 2.

25 ¹⁴⁶ Pl’s Mot at 15.

26 ¹⁴⁷ *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 784-85,
 27 719 P.2d 531 (1986); see also *Reed v. Whitacre*, 147 Wash. App. 1007, 2008 WL 4635914, 3
 28 (Wash. App. Div. 2, Oct. 21, 2008) (reversing trial court’s denial of the insurance company’s
 29 motion for summary judgment against the plaintiff’s CPA claim in a DV claim).

30 ¹⁴⁸ Bennett Dec, Exhibit 30 at 2.

1 intends to make a claim.¹⁴⁹ An insurance company does not “misrepresent” or “conceal” the
 2 terms or benefits of the UIM coverage or violate claims handling regulations by not
 3 informing a policyholder of all types of loss that could be claimed under a particular
 4 coverage.¹⁵⁰ Also, many insureds know they can present such a claim. Some choose to
 5 make a claim, and some choose not to make a claim. A class action is not a superior means
 6 to litigate facts regarding misrepresentation, causation and injury and allegations that the
 7 defendants’ conduct violated duties owed under claims handling regulations.

8 VI. PLAINTIFF’S MOTION SHOULD BE DENIED

9 Instead of outlining a plan that would allow this Court to weigh whether liability for
 10 breach of contract damages can be fairly determined on a class-wide basis, Plaintiff Meyer
 11 proposes to arrive at an amount each class member is “entitled to receive” based upon a
 12 comparison between a class wide estimate of damages (an “average per claim loss” taken
 13 from a decade old database) and an average payment amount he proposes to cull from a
 14 sample of AFM claim files regarding separate accidents, and separate vehicles where

- 15 • DV payments may have been made after the AFM
 property damage adjusters exercised their judgment and
 discretion, and weighed any number types of
 information, including comparative fault; or
- 16 • a claim was made, but no diminished value was found to
 exist; or
- 17 • a claim was made, but no payment was made, and the
 disputed decision was resolved in a compromise; or

21 ¹⁴⁹ The insured is required to establish the existence of actual physical damage. *Degenhart v.*
 22 *AIU Holdings, Inc., supra*, 2010 WL 4852200 at 5. “[T]here is no presumption of inherent
 23 diminution of value in automobile tort cases” *Defraites v. State Farm Mut. Auto. Ins.*
 24 *Co.*, 864 So.2d 254, 261 (La. App. 5th Cir., 2004).

25 ¹⁵⁰ *Tavakoli v. Allstate Property and Cas. Ins. Co.*, 2012 WL 6677766 (W.D. Wash., Dec. 21,
 26 2012); see also *Defraites, supra*, 864 So.2d at 261 (“[The Louisiana insurance claims
 handling statute] requires the insurer to initiate loss adjustment of a property damage claim
 within a specified period of time, but there is nothing in this statute which requires the
 insurer to make an offer for an item of damages which is neither claimed nor factually
 supported based on the evidence.”)

- 1 • a claim was made, but no payment was made, and the
2 disputed decision was resolved after an arbitration, or
- 3 • no claim was made because a policyholder decided that
4 he or she was satisfied with the repairs and chose not
5 make a DV claim, or
- 6 • no claim was made where (unlike Plaintiff Meyer and
7 Christina Bower) the policyholder did not know about
8 diminished value and would have made a claim.

7 FRCP 23's standards have not been met. These numerous and disparate claims issues
8 cannot be fairly tried in the aggregate. Plaintiff Meyer's motion to certify should be denied.

9 DATED: February 27, 2015

10 BULLIVANT HOUSER BAILEY PC

11 By /s/ John A. Bennett

12 John A. Bennett, WSBA #33214

13 E-mail: john.bennett@bullivant.com

14 Attorneys for Defendants American Family
15 Mutual Insurance Company and American
16 Standard Insurance Company of Wisconsin

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing **DEFENDANTS' MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION** was
served upon:

Stephen M. Hansen via ECF filing
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via ECF filing

I declare under penalty of perjury under the laws of the United States on this 27th day of February, 2015, at Portland, Oregon.

/s/ John A. Bennett

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